

STATEMENT
OF
LAWRENCE A. CRESCE, PRESIDENT
ASSOCIATION OF FEDERAL INVESTIGATORS

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS

UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

FEDERAL TORT CLAIMS ACT

ON

APRIL 28, 1983



Mr. Chairman,

On behalf of the Association of Federal Investigators (AFI), I welcome this opportunity to comment on H.R. 595.

This bill is of utmost concern not only to the Federal law enforcement community, but to all Federal officials making decisions involving personnel in and out of Government.

In 29 years as a Federal investigator, with the last 3 as the Assistant Inspector General for Investigations in the Office of Inspector General, Department of Transportation, I have observed first hand the need for revision of the Federal Tort Claims Act.

I have friends and colleagues who, having dedicated their lives to fulfilling their sworn obligation to defend and support the Constitution of the United States, have had to protect themselves and their reputations against law suits, involving Constitutional torts, many of which have proven to be without substance and are vindictive in nature.

The current Vice President of the Association of Federal Investigators was named as a defendant in a suit filed in a United States district court on April 12, 1982. He and three other individuals were sued for over \$52 million, both individually and in their official capacities as Government officials. There are two similar suits pending in my agency against investigators and auditors as well as the Inspector

General and the former Secretary of Transportation. One of the plaintiffs was recently convicted for fraud against the Government; the other is awaiting arraignment on similar charges.

It is not my intention to dwell on the merits of these suits, but I do believe that some of the implications and ramifications deserve comment. Under our present system, anyone can charge that he/she has been injured by the actions of certain officials and lay claim for damages. The complaint can make statements specifying certain actions on the part of the defendants for which the "aggrieved party" is seeking remuneration. The greater the amount of compensatory or punitive damages, the more likely the charges will receive media attention.

The defending officials are often precluded from responding to inquiries from the media regarding such charges because of various restrictions, including the Privacy Act. In effect, the charges are aired, sometimes sensationally, while the defendants quietly go about defending themselves for actions they took in performing their official duties.

In cases where the plaintiff is a Government employee, such suits may be filed against Government officials, even though there are other appeal rights to which he may or may not have availed himself. Most agencies will have a grievance process in which a grievance examiner will present his findings to an independent deciding official. Should the

deciding official uphold the agency, the employee may request the Office of the Special Counsel to conduct an independent review if the complaint pertains to a personnel action. Again, should the Office of the Special Counsel fail to uphold the employee's position and the agency decides to take an adverse action, the employee may appeal to the Merit Systems Protection Board.

An employee who feels he has been wronged may institute suit at any point regardless of the merits. Response to such action is often burdensome to the officials involved, their general counsel and the United States Attorney's office. Since most components within the Federal Government are not geared toward this type of activity, it will force significant distraction from assigned duties. In the case of vexatious or nuisance suits, this represents a gross waste of Federal funds and human energy that should be spent on more worthwhile projects.

The mere threat of being "named" in such a suit will deter many officials from taking decisive, required actions. They will look for an easier way out. Vacillation, delay, ineffective decisions and permissiveness result. Such attitudes do not go unnoticed in the workforce. Malcontents will take advantage of the resultant laxity. It will also adversely affect the morale of the other employees who strive to do what is necessary and proper, and yet see a certain few of their peers "manipulating" the system.

I would like now to focus briefly on the Federal investigator. Most of the Bivens type cases involved law enforcement officers alleged to having committed Constitutional torts. Of the thousand or so cases filed to date, there have only been a handful of adverse judgments, several of which are under appeal.

I think we can arrive at two conclusions from these statistics: First, the vast majority of investigators perform their duties in a competent, legal manner and are loyal to their oath to defend and support the Constitution of the United States. Secondly, a vast majority of suits are insupportable.

In most of those instances where an aggrieved party is seeking redress, I think you will find that the injury, if there indeed was one, was not one of willful intent on the part of the investigator, but was simply an error of omission or commission, in which case the United States Government is truly the responsible party for having failed to properly train and supervise its agent. The Association of Federal Investigators, by working closely with various investigative bodies, hopes to provide the necessary guidance and training to eliminate such instances or, failing this, to keep them at an absolute minimum.

It is with this background that the Association of Federal Investigators supports the goals of H.R. 595. We do recommend, however, that certain amendments be considered.

We believe that the "good faith" defense should be retained and not waived. Should the United States substitute itself as the defendant, we believe that it is entitled to the attendant defenses otherwise available to its employees.

Also, we do not support the provision in H.R. 595 permitting payments to claimants for reasonable attorneys' fee in matters involving Constitutional torts. To create such a distinction would, in our view, bring about merely artful pleading on the part of a creative lawyer and protracted litigation in determining whether a particular tort was properly pled. This provision would not serve the cause of justice or equity but would simply lead to larger attorney fees, however "reasonable" they might be. In short, it would be counterproductive.

Mr. Chairman, if H.R. 595, with the above modifications, is enacted, it would reaffirm to all Federal investigators that the United States Government expects them to perform their duty in a proper and forthright manner, and that it is willing to stand behind them while they are acting within the scope of their employment. It would also remove the chilling effect that potential personal liability has on program managers and supervisors to take appropriate adverse actions against subordinates when circumstances and duty dictate.

The foregoing in no way proposes to shield from appropriate punitive action any official who deliberately or willfully violates the rights of others.

Passage of H.R. 595 should take away any incentive to file spurious, vindictive, or frivolous legal actions by those seeking retribution against any Federal employees who act within the scope of their duties.

In conclusion, the Association of Federal Investigators strongly urges passage of H.R. 595.